ALAN WILSON
ATTORNEY GENERAL

January 28, 2013

The Honorable Larry A. Martin
Senator, District No. 2
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Martin:

You have requested an opinion regarding the constitutional validity of "the Pickens County School Board ... having an invocation at its regularly monthly meeting." By way of background, you state the following:

> A student is selected by one of the four high school principals on a rotating basis each month. The student is requested to provide for an invocation and is not instructed in any way by either the principal or school district staff regarding the nature of the invocation to be offered.
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> An out-of-state group known as the Freedom from Religion organization has written a letter to the board chairman challenging the board's practice. Moreover, this group has threatened legal action if the board does not cease using a student to offer an invocation. It is my understanding it has threatened the practice of having an invocation on a general basis as well. As you know, the Legislature in recent years has enacted a couple of statutes dealing with public invocations and the involvement of students in offering an invocation at a school related event. It is my view, that the federal courts have not banned all prayers per se but have been careful to rule that a school board or public body may not dictate the nature or content of a prayer if an invocation type message is offered.
>
> I would respectfully request the opinion of your office concerning the practice of the Pickens County School Board as it relates to its invocation in general and the utilization of a student that is not coerced or instructed in any way as to what to say when offering an invocation. There most likely have been later court decisions since the enactment of the statutes I referenced and I would hope that the guidance that your office can provide would enable the board to deal with this matter very quickly. Thank you in advance for your kind

attention to my request. Please do not hesitate to contact me if I can provide additional information.

We have discussed this matter extensively with the School Board's attorney and have reviewed the legal advice which he has provided to the Board. According to that advice letter, it is the present practice at Board meetings to allow "a student from the 'School of the Month' to offer what has virtually been in the past a sectarian invocation." The practice has been, we are advised, that the student makes the invocation without direct involvement from the Board.

Law/Analysis

In our analysis, it is important to first review the two statutes to which you refer in your letter. S.C. Code Ann. § 6-1-160 provides as follows:

> **Authority to adopt ordinance allowing invocation to open public meeting of deliberative public body; definitions.**
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> (A) For purposes of this section:
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> (1) "Public invocation" means an invocation delivered in a method provided pursuant to subsection (B) to open the public meeting of a deliberative public body. In order to comply with applicable constitutional law, a public invocation must not be exploited to proselytize or advance any one, or to disparage any other faith or belief.
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> (2) "Deliberative public body" means a state board or commission, the governing body of a county or municipal government, a school district, a branch or division of a county or municipal government, or a special purpose or public service district.
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> (B) A deliberative public body, by ordinance, resolution, or written policy statement, may adopt a policy to permit a public invocation as defined in subsection (A)(1) before each meeting of the public body, for the benefit of the public body. The policy may allow for an invocation to be offered on a voluntary basis, at the beginning of the meeting, by:
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> (1) one of the public officials, elected or appointed to the deliberative public body, so long as the opportunity for invocation duty is regularly and objectively rotated among all of that deliberative public body's public officials;
>
> (2) a chaplain elected by the public officials of the deliberative public body; or

(3) an invocation speaker selected on an objective and rotating basis from among a wide pool of the religious leaders serving established religious congregations in the local community in which the deliberative public body meets. To ensure objectivity in the selection, the deliberative public body on an annual basis shall compile a list of all known, established religious congregations and assemblies by reference to local telephone books or similar sources, or both, and on an annual basis shall mail an invitation addressed to the 'religious leader' of each congregation and assembly. The invitation must contain, in addition to scheduling and other general information, the following statement: "A religious leader is free to offer an invocation according to the dictates of his own conscience, but, in order to comply with applicable constitutional law, the [name of deliberative public body issuing the invitation] requests that the public invocation opportunity not be exploited to proselytize or advance any one, or to disparage any other faith or belief". Each respondent who accepts the invitation to deliver an invocation at an upcoming meeting of the deliberative public body shall be scheduled to deliver an invocation on a first-come, first-served basis.

(C) In order that deliberative public bodies may have access to advice on the current status of the law concerning public invocations, the Attorney General's office shall prepare a statement of the applicable constitutional law and, upon request, make that statement available to a member of the General Assembly or a deliberative public body. As necessary, the Attorney General's office shall update this statement to reflect any changes made in the law. The Attorney General's office may make the statement available through the most economical and convenient method including, but not limited to, posting the statement on a web site.

(D) The Attorney General shall defend any deliberative public body against a facial challenge to the constitutionality of this act.

(E) Nothing in this section prohibits a deliberative public body from developing its own policy on public invocations based upon advice from legal counsel.

In addition §§ 59-1-441 and 59-1-442 further state:

§ 59-1-441. Policy to permit student to deliver message.

(A) The governing body of a school board or school district may adopt a policy that permits graduating high school students as selected by school policy using objective criteria such as academic standing or the ex-officio function of a student office or position, to deliver a brief opening or closing message, or both, of two minutes or less, at the high school's graduation exercises.

(B) If a student delivers a brief opening or closing message, or both, of two minutes or less, the content of that message must be prepared or selected by the student and may not be recommended, monitored, reviewed, or censored by a member of the governing body of the school district, its officers, or employees. No student may be disciplined or reprimanded by the school for the content of any nonobscene, nonprofane, or nonvulgar message delivered pursuant to this section.

(C) The provisions of this section do not apply to policies of the school district or high school that relate specifically to more lengthy, extensive, or featured speeches at the high school's graduation delivered by a class valedictorian or other student selected on bases such as academic standing or position in student government.

§ 59-1-442. Policy to permit opening or closing message at school-sponsored athletic events.

(A) The governing body of a school board or school district may adopt a policy that permits either (1) the captains of athletic teams at a high school or their student designees; or (2) a student designated by the members of that team to deliver a brief opening or closing message, or both, of two minutes or less, at school-sponsored athletic events.

(B) If team captains, their student designees, or the student designees of athletic teams deliver a brief opening or closing message, or both, of two minutes or less, the content of that message must be prepared or selected by the student and may not be recommended, monitored, reviewed, or censored by a member of the governing body of the school district, its officers, or employees. No student may be disciplined or reprimanded by the school for the content of any nonobscene, nonprofane, or nonvulgar message delivered pursuant to this section.

With these statutory provisions in mind, we will now analyze the question raised by your request. Your concerns are with the constitutional validity under the Establishment Clause of the First Amendment of the situation where a school board uses a student, selected by the Board, to deliver a prayer or invocation at Board meetings.

The seminal case in this area is *Marsh v. Chambers*, 463 U.S. 783 (1983), which established the so-called "legislative prayer" exception under the Establishment Clause. In *Marsh*, the Court upheld the Nebraska legislature's practice of opening each session with a prayer led by a chaplain paid with public funds. The Court based its holding "on an extensive historical inquiry, concluding that since members of the First Congress had authorized the appointment of paid chaplains only three days before agreeing to the language of the Establishment Clause, they could not have intended the Establishment Clause 'to forbid what

they had just declared acceptable.'" *Wynne v. Town of Great Falls*, 376 F.3d 292, 297 (2004), quoting *Marsh*, 463 U.S. at 786-790. According to the Fourth Circuit in *Wynne*,

> "this unique history" led the [Marsh] Court to "accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged." *Id.* at 791, 103 S.Ct. 3330. Thus, the Court concluded that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not, *in these circumstances*, an 'establishment' of religion." *Id.* at 792, 103 S.Ct. 3330 (emphasis added). The *Marsh* Court emphasized, however, that the legislative prayer at issue there did not attempt "to proselytize or advance any one, or to disparage any other faith or belief. *Id.* at 794-95, 103 S.Ct. 3330.

Id. at 297.

Following *Marsh*, the question has arisen in a number of lower court decisions as to whether a school board is a "legislative" or "other deliberative body" for purposes of establishing the *Marsh* exception. If a school board can be characterized as a legislative or deliberative body, it can, under *Marsh*, open its meetings with an invocation. However, if not, Marsh is inapplicable and the prayer would likely violate the Establishment Clause under the school prayer cases.

Some decisions have concluded that indeed *Marsh* is inapplicable to a school board meeting and thus no invocation may be given to open the meeting of such a body. See, *Coles v. Cleveland Bd. of Ed.*, 171 F.3d 369 (6th Cir. 1999). In *Coles*, the Sixth Circuit concluded that "the school board, unlike other public bodies, is an integral part of the public school system. This fact serves to make the unique tradition articulated in *Marsh* inapposite, while it embraces the more 'hands-off' tradition observed in the long lines of school prayer cases." (citing *Lee v. Weisman*, 505 U.S. 577, 596-97 (1992) and other school prayer decisions). Likewise, in *Doe v. Indian River School Dist.*, 653 F.3d 256 (3d Cir. 2011) the Third Circuit held that the legislative prayer exception did not apply to school district and school board. In *Indian River*, the Court distinguished school board meetings from other bodies, finding that "the type of potentially coercive atmosphere the Supreme Court asks us to guard against is present here ...." 553 F.3d at 282.

On the other hand, however, there are decisions from other jurisdictions which reach the opposite conclusion, holding that *Marsh's* legislative prayer analysis is applicable to a school board. See, *Bacus v. Palo Verde Unified School District Bd. of Ed.*, 11 F.Supp.2d 1192 (C.D. Cal. 1998). In *Bacus*, the Court applied *Marsh* in the context of a school board, concluding that plaintiffs seeking to enjoin school board prayer "failed to establish any likelihood of success on the merits of their First Amendment claim." 11 F.Supp.2d at 1198. The Court noted that "the fact that at any given Board meeting there may be children present in the audience, some of whom may participate in an award session or address the Board on a

particular topic, does not change the nature or the function of the Board meeting." 11 F.Supp.2d at 1197. Further, the *Bacus* Court reasoned as follows:

> Although this court recognizes that a school board does conduct the business of the public schools, a school board meeting does not cause the heightened concerns regarding children found in school related contexts. Members of a school board are elected public officials, not school children. The main purpose of a school board meeting is to conduct the business of the public schools. California Education Code § 35160.1(b) gives school boards "broad authority to carry on activities and programs, including the expenditure of funds for programs and activities, which in the determination of the governing board of the school district ... are necessary or desirable in meeting their needs...." The Board is the governing body of the PVUSD whose annual budget exceeds $20 million dollars. The responsibilities of the Board include the determination of "curriculum, policies, employment/personnel decisions, contracts, budgets and all expenditures in the district, including real estate and litigation." Its function is primarily policy and rule making which makes it akin to a deliberative public body.

11 F.Supp.2d at 1196-1197. And, in *Doe v. Tangipahoa Parish School Bd.*, 631 F.Supp.2d 823 (E.D. La. 2009) the Court concluded that school board's policy of opening school board meetings with a prayer delivered by a member of the local clergy fell within the legislative prayer exception to traditional Establishment Clause analysis, requiring examination as to whether prayer opportunity had been exploited to advance Christianity. Still other decisions assume *Marsh* is applicable, but without deciding the issue. See, *Doe v. Tangipahoa Parish School Bd.*, 473 F.3d 188 (5th Cir. 2006), vacated on rehearing en banc on other grounds, 494 F.3d 494 (5th Cir. 2007).

No decision of the Fourth Circuit addresses this issue specifically. But see, *Mellen v. Bunting*, 341 F.3d 312 (4th Cir. 2003) (Opinions of Widener, Wilkinson and Neimeyer, JJ's, dissenting in denial of rehearing en banc). [See, especially opinion of Wilkinson, 341 F.3d at 319-320 noting that the school prayer cases "dealt only with religious exercises in primary and secondary classrooms. It is the "age and maturity of audiences" which is the "essential ... ingredient" in these cases.]. Moreover, in an Opinion of this Office, dated September 12, 2000 (2000 WL 1478795), we concluded that *Marsh* does apply to school board meetings. In that Opinion, we referenced the Court's reasoning in *Bacus*, as well as an opinion of the Virginia Attorney General. There, we quoted the following passage with approval from the Virginia Attorney General's opinion:

> [l]ike legislative prayer which is primarily directed to legislators themselves, the invocation in question is directed to the school board members. ... Additionally, the nature and function of the board meeting is a meeting of adults with official business and policymaking duties .... The fact that two students voluntarily attend such meetings to provide input (along with any other students who may

> from time to time voluntarily attend such meetings) does not transform the board's meetings from a policy and rule-making function into an official school function akin to a graduation ceremony or classroom instruction. It is, thus my view that, like city councils and boards of supervisors, a school board is a deliberative public body charged with deciding business and policy issues. Consequently, it is also my view that the board's meetings do not warrant the level of constitutional scrutiny required by the United States Supreme Court that an official public school function would warrant with regard to conducting prayer.

Thus, in our 2000 opinion, we concluded that "the prayer at issue [of the school board] is the prayer of a public deliberative body which occurs in a fundamentally adult atmosphere rather than in a student-oriented or school-oriented atmosphere. Accordingly, based on the facts presented, it is [our] ... opinion that if members of a local school board wish to do so, they may open their board meetings with a prayer." *Accord., Op. S.C. Atty. Gen.,* August 10, 1998 (1998 WL 746172) ["We agree that the rationale of *Marsh* is applicable to school board meetings and that a prayer at the beginning of such meetings would most likely be deemed constitutional."].

Furthermore, courts, in other contexts, have afforded school boards with "legislative immunity" for purposes of § 1983 liability. For example, in *Smith v. Jefferson Co. Bd. of School Commrs.*, 641 F.3d 197, 219 (6th Cir. 2011), the Court held that "the Board members may be sued in their official capacities but may not be sued for money damages or declaratory or injunctive relief ... [b]ecause the Board members are entitled to legislative immunity ...." See also, *Chadwell v. Lee County School Bd.*, 457 F.Supp. 690 (W.D. Va. 2006) [actions of school board were "legislative" in nature and board members were entitled to legislative immunity.].

Consistent with this analysis is § 6-1-160(A)(2), which defines "deliberative public body" to include a school district. Inasmuch as the foegoing authorities support application of *Marsh* to school boards, we believe § 6-1-160(A)(2) is constitutional on its face.

Moreover, school boards in South Carolina are deemed political subdivisions of the State. Section 59-19-10 states that "[e]ach school district shall be under the management and control of the board of trustees ...." As our Supreme Court observed in *Patrick v. Maybank,* 198 S.C. 262, 17 S.E.2d 530, 534 (1941),

> [a] school district is a body politic and corporate under the laws of this State and constitutes one of our most important political subdivisions, having the right to sue and be sued, and is capable of contracting and being contracted with the extent of its school fund, and may hold both real and personal property. And while the record before us does not refer to any bonded or other indebtedness, school districts are given the power upon certain conditions to issue bonds, and

> incidental to their public functions incur obligations affecting all taxpayers of the district, whether residents or not . . . .

Thus, based upon these authorities, and consistent with § 6-1-160(A)(2), which we believe is facially constitutional, it is our opinion that a court would likely conclude that a school board in South Carolina, such as the Pickens School Board, is entitled to be deemed a "deliberative body" for purposes of *Marsh*, and thus could begin each meeting with a prayer or invocation.

The question then becomes what type of prayer is constitutionally permitted for the Board to conduct? As § 6-1-160 emphasizes, consistent with *Marsh* and *Wynne, supra*, "[i]n order to comply with applicable constitutional law, a public invocation must not be exploited to proselytize or advance any one or to disparage any other faith or belief." In *Wynne*, while this Office disagreed strongly with the Court, the Fourth Circuit held that a sectarian prayer, employed by the Town of Great Falls, "crossed the constitutional line established in *Marsh* and [*County of*] *Allegheny* [*v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989)]. 376 F.3d at 298. According to the *Wynne* Court,

> ... we must reject the Town Council's arguments that *Marsh* renders the challenged prayers constitutional. *Marsh* does not permit legislators to do what the district court, after a full trial, found the Town Council of Great Falls did here – that is to engage, as part of public business and for the citizenry as a whole, in prayers that contain explicit references to a deity in whose divinity only those of one faith believe. The invocations at issue here; which specifically call upon Jesus Christ are simply not constitutionally acceptable legislative prayer like that approved in *Marsh*. Rather, they embody the precise kind of "advance[ment]" of one particular religion that *Marsh* cautioned against. Accordingly, we hold the district court did not err in finding that the challenged prayers violated the Establishment Clause and enjoining the Town Council "from invoking the name of a specific deity associated with any one specific faith or belief in prayers given at Town Council meetings."

Id. at 301-302.

Decisions of the Fourth Circuit subsequent to W*ynne* generally adhere to the *Wynne* decision. In *Simpson v. Chesterfield Co. Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005), the Court applied *Marsh* to a non-sectarian prayer employed by a county board of supervisors. Citing *Marsh*, as well as *Wynne*, the Fourth Circuit stated that "[b]ased on the long history of legislative prayer in Congress, *Marsh* concluded that non-sectarian prayer generally does not violate the Establishment Clause." According to the Court,

> [a]s *Marsh* teaches, legislative invocations perform the venerable function of seeking divine guidance for the legislature. As such, these invocations constitute "a tolerable acknowledgment of beliefs widely held among the people

> of this country," being as we are "'a religious people whose institutions presuppose a Supreme Being.'"

404 F.3d at 282.

The *Simpson* Court further commented as to the audience reached by legislative invocations. In the Fourth Circuit's view,

> [a]dditionally, it mattered in *Marsh* that the audience during legislative invocations consists of "adult[s], presumably not readily susceptible to religious indoctrination or peer pressure." *Marsh*, 463 U.S. at 792, 103 S.Ct. 3330 .... This contrasts greatly with the Court's concern with, for instance, school children. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 596-97, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (comparing the "atmosphere at the opening of a session of a state legislature where adults are free to enter and leave" with public school functions like graduations). See also *School Dist. of Abington Tp. v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962).

Id at 283. Thus, according to the Court, the invocations in question were "'directed only at the legislators themselves' ...." *Id.* at 284.

Further, the selection of those leading the prayer for the Board of Supervisors was deemed constitutionally valid. In the words of the Fourth Circuit,

> [t]he principles set forth in *Marsh* work to sustain the County's clergy selection policy. The fact that Chesterfield's invocations are not given by a single, paid chaplain does not provide the County of *Marsh's* protection. Indeed, the selection aspect of the practice here is in many ways more inclusive than approved by the *Marsh* Court. Ministers in Chesterfield, unlike in *Marsh*, are not paid with public funds. In contrast to *Marsh's* single Presbyterian clergyman, the County welcomes rabbis, imams, priests, pastors and ministers. Chesterfield not only sought but achieved diversity. Its first-come, first-serve system led to prayers being given by a wide cross-section of the County's religious leaders.

Id. at 285.

Moreover, the Fourth Circuit decision in *Turner v. City Council of City of Fredericksburg, Virginia*, 534 F.3d 352 (4th Cir. 2008), is instructive. There, the Fourth Circuit concluded that a nondenominational prayer, employed by the City Council, did not violate the Establishment Clause nor a member of the Council's First Amendment rights. Former Justice O'Connor (retired), writing for the Court, summarized the Establishment Clause law in this area as follows:

> The Supreme Court of the United States has treated legislative prayer differently from prayer at school events: "[T]here can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment.' " *Marsh v. Chambers,* 463 U.S. 783, 792, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). Opening prayers need not serve a proselytizing function, and often are an "acknowledgement of beliefs widely held among the people of this country." *Id.* So long as the prayer is not used to advance a particular religion or to disparage another faith or belief, courts ought not to "parse the content of a particular prayer." *Id.* at 795, 103 S.Ct. 3330; *see also Wynne v. Town of Great Falls,* 376 F.3d 292, 298 (4th Cir.2004).
>
> We need not decide whether the Establishment Clause *compelled* the Council to adopt their legislative prayer policy, because the Establishment Clause does not absolutely dictate the form of legislative prayer. In *Marsh,* the legislature employed a single chaplain and printed the prayers he offered in prayerbooks at public expense. By contrast, the legislature in *Simpson* allowed a diverse group of church leaders from around the community to give prayers at open meetings. *Simpson,* 404 F.3d at 279. Both varieties of legislative prayer were found constitutional. The prayers in both cases shared a common characteristic: they recognized the rich religious heritage of our country in a fashion that was designed to include members of the community, rather than to proselytize.
>
> The Council's decision to provide only nonsectarian legislative prayers places it squarely within the range of conduct permitted by *Marsh* and *Simpson.* The restriction that prayers be nonsectarian in nature is designed to make the prayers accessible to people who come from a variety of backgrounds, not to exclude or disparage a particular faith. The Council's decision to open its legislative meetings with nondenominational prayers does not violate the Establishment Clause.

Id. at 356.

Moreover, the *Turner* Court concluded that the member's Free Exercise and First Amendment rights were not infringed. The Court, concluding that the prayer was government speech (offered by one of the Council members), concluded:

> Turner was not forced to offer a prayer that violated his deeply-held religious beliefs. Instead, he was given the chance to pray on behalf of the government. Turner was unwilling to do so in the manner that the government had

> proscribed, but remains free to pray on his own behalf, in nongovernmental endeavors, in the manner dictated by his conscience.
>
> His First Amendment and Free Exercise rights have not been violated.

Id.

And, in *Joyner v. Forsyth County, North Carolina*, 653 F.3d 341 (4th Cir. 2011), the Fourth Circuit held that the board's policy of opening its meetings with sectarian prayers violated the Establishment Clause. In *Forsyth County*, the Board maintained a database of all religious congregations in the community. No eligible congregation was excluded and any congregation could confirm its inclusion by writing the clerk. The list was periodically updated and the clerk would mail an invitation to the "religious leader" of each congregation. Leaders were then allowed to deliver an invocation on a first-come, first-serve basis. Leaders could voluntary appear to deliver the invocation according to the dictates of their own conscience. Expressly, leaders were urged not to proselytize or disparage other faiths. No leader could be scheduled for more than two meetings in any calendar year.

While the Board assumed a "hands off" approach to content, as it turned out, the prayers frequently contained references to Christ. Suit was filed, thus contending the Board policy violated the Establishment Clause.

The Fourth Circuit concluded that the Board's policy was unconstitutional. According to the Court,

> [t]aken together, the principles set forth by the Supreme Court in *Marsh* and *Allegheny* and by this circuit in *Wynne* and *Simpson* establish that the Board's policy, as implemented, cannot withstand scrutiny. The December 17, 2007 prayer—the prayer that led to the plaintiffs' amended complaint—clearly crossed the constitutional line. In *Wynne*, we concluded that the town council's prayers "clearly 'advance[d]' one faith, Christianity, in preference to others, in a manner decidedly inconsistent with *Marsh*," *Wynne*, 376 F.3d at 301, because they ended with a solitary reference to Jesus Christ. The prayer here went further. It discussed specific tenets of the Christian religion, from the "Cross of Calvary" to the "Virgin Birth" to the "Gospel of the Lord Jesus Christ." The December 17 invocation thus "engage[d], as part of public business and for the citizenry as a whole, in prayers that contain[ed] explicit references to a deity in whose divinity only those of one faith believe." *Wynne*, 376 F.3d at 301.
>
> Nor was the December 17 prayer the exception, rather than the rule, as our friend in dissent suggests. *Post* at 361–62. December 17 was of course the day Joyner and Blackmon chose to attend a Board meeting and heard the sectarian opening prayer. But the day was hardly unusual. As the magistrate judge found, "[t]he undisputed record shows that the prayers delivered at the

> outset of Board meetings from May 29, 2007 through December 15, 2008 referred to Jesus, Jesus Christ, Christ, or Savior with overwhelming frequency." Almost four-fifths of the prayers contained such references. The prayers closed—like the prayers in *Wynne*—with invocations to "the gracious name of the Lord Jesus Christ," with references to "the merits of Jesus Christ, Thy Son and our Savior," and with reminders that the prayers were "[i]n the blessed name of Jesus." *See Wynne*, 376 F.3d at 294 (prayers closed with "In Christ's name we pray"). The prayers before the policy likewise featured a substantial number of sectarian references.
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> Moreover, it is not the case, as the dissent suggests, that the prayers "were largely generic petitions to a Divine Being to bless the legislative body and request that it be guided to act wisely and justly in the interest of the citizens." *Post* at 360. If that were true, this case would be quite different. But here there were many prayers that not only invoked Jesus' name throughout, *see, e.g.*, February 25, 2008 (beginning, "Father ... we thank you for your son Jesus Christ our redeemer, we thank you for the holy spirit who is our guidance and our counselor"); but also that both before and after the policy invoked specific tenets and articles of faith of Christianity, *see, e.g.*, November 10, 2008 (opening with thanks to God "for the Lord Jesus Christ, the one that loved us and gave himself for us at Calvary"); February 12, 2007 (praying "oh Lord, our Lord, we thank you for your son Jesus who died on Calvary that we might have a life and have it more abundantly"). Taken as a whole, it is clear that the prayers offered under the Board's policy did not "evoke common and inclusive themes and forswear ... the forbidding character of sectarian invocations." *Simpson*, 404 F.3d at 287. *Wynne* and *Simpson* set forth the constitutional line, and these prayers crossed it.

Id. at 349-350. The *Forsyth* Court rejected a number of arguments made by the Board to the effect that the prayers were valid. In the Court's opinion, *Wynne* was not distinguishable on the basis that the prayers in *Wynne* were delivered by members of the Town Council. The Fourth Circuit concluded that "[i]t was the governmental setting for the delivery of sectarian prayers that courted constitutional difficulty, not those who actually gave the invocation." *Id.* at 350.

In addition, the Fourth Circuit rejected the same argument that this Office made in *Wynne* – that *Marsh* stated that courts should not "parse the content of a particular prayer." *Marsh*, 463 U.S. at 795. Disagreeing with the dissent on this point, the majority stated:

> It is true that *Marsh* stated that courts should not "parse the content of a particular prayer." *Marsh*, 463 U.S. at 795, 103 S.Ct. 3330. This makes perfect sense. As a practical matter, courts should not be in the business of policing prayers for the occasional sectarian reference—that carries things too far. But the dissent gives the impression that virtually any review by the majority of the invocations under challenge would constitute impermissible "parsing." Quite

> simply, this stark approach leaves the court without the ability to decide the case, by barring any substantive consideration of the very practice under challenge. It is to say the least an odd view of the judicial function that denies courts the right to review the practice at issue. For to exercise no review at all—to shut our eyes to patterns of sectarian prayer in public forums—is to surrender the essence of the Establishment Clause and allow government to throw its weight behind a particular faith. *Marsh* did not countenance any such idea.
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> In fact, the *Marsh* Court only endorsed such a hands-off approach in situations where "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794–95, 103 S.Ct. 3330. In other words, courts need to assure themselves that legislative prayer opportunities are not being exploited before they abdicate all constitutional scrutiny. The district and magistrate judges did just that by following precedent and making the determination that *Marsh* and this Circuit's own decisions require.
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> That is precisely the approach we applied in *Wynne*. Rather than "parsing" the details of a particular prayer, we looked at the district court's factual findings about the frequency with which the council "invoked 'Jesus,' 'Jesus Christ,' 'Christ,' or 'Savior' " in determining whether the prayers actually did proselytize or advance a particular sect. *Wynne*, 376 F.3d at 298 n. 4. We took the same approach in *Simpson* as well, taking note of the "wide variety of prayers" and their "nonsectarian[ ]" nature. *Simpson*, 404 F.3d at 284. The district court here followed suit, relying on the magistrate's findings about the "overwhelming frequency" of references to "Jesus, Jesus Christ, Christ, or Savior" in determining that the prayers did advance one particular faith.

653 F.3d at 351-352. Finally, the Court concluded that while the Board's policy was facially neutral, as implemented, "[u]nlike in *Simpson*, the Board's policy was not in any way proactive in discouraging sectarian prayer in public settings." *Id.* at 353. More precisely, according to the Court,

> On a broader level, and more importantly, citizens attending Board meetings hear the prayers, not the policy. What this means is that we cannot turn a blind eye to the practical effects of the invocations at issue here. The dissent suggests that the "frequency of Christian prayer" was merely the "product of demographics," *post* at 363, and the County "could not control whether the population was religious," *id.* What the dissent offers as a defense of the policy, however, is one of the problems with it. Take-all-comers policies that do not discourage sectarian prayer will inevitably favor the majoritarian faith in the community at the expense of religious minorities living therein. This effect creates real burdens on citizens—particularly those who attend meetings only sporadically—for they will have to listen to someone professing religious

> beliefs that they do not themselves hold as a condition of attendance and participation. "To ... Jewish, Muslim, Bahá'í, Hindu, or Buddhist citizens[,]a request to recognize the supremacy of Jesus Christ and to participate in a civic function sanctified in his name is a wrenching burden." *See* Amicus Br. of American Jewish Congress et al. 8. Such burdens run counter to the essential promise of the Establishment Clause. *See Larson,* 456 U.S. at 244, 102 S.Ct. 1673.
>
> This is not to say that the Board must abandon the practice of legislative prayer. Nor do we wish to set forth some sort of template for an ideal legislative prayer policy. After all, as we recognized in *Simpson,* "too much judicial fine-tuning of legislative prayer policies risks unwarranted interference in the internal operations of a coordinate branch." *Simpson,* 404 F.3d at 286–87. The bar for Forsyth County is hardly a high one. Public institutions throughout this country manage to regularly commence proceedings with invocations that provide all the salutary benefits of legislative prayer without the divisive drawbacks of sectarianism. *See id.* at 287 (describing how Chesterfield County's invocations sought "guidance that is not the property of any sect"). And religious leaders throughout this country have offered moving prayers on multitudinous occasions that have managed not to hurt the adherents of different faiths. In the end, the constitutional standard asks of the County no more than what numerous public and governmental entities already meet. Indeed, some of the prayers offered in this very case—albeit a minority—plainly met it.

Id. at 354. Thus, *Forsyth* makes clear that the prayers of a deliberative body must be nonsectarian, that a court will look beyond the facial neutrality of a prayer policy to see how it is being implemented and that the body must be proactive in insuring that the prayers be nonsectarian.

We turn now to the Pickens County School Board's policy of using students to deliver the invocation at School Board meetings. We emphasize that we have found no case directly on point, where a school board used students to give the prayer at its meetings. Moreover, as discussed above, it is our opinion that meetings of a school board are more akin to that of a deliberative body rather than a school event. As the Court concluded in *Dobrich v. Walls*, 380 F.Supp. 2d 366, 376 (D. Del. 2005),

> [i]n the Court's view, these allegations pertain to the development, adoption and implementation of policies, practices and customs for the District, activities which are part and parcel of the very type of legislative activity which has been recognized as sufficient to confer absolute immunity on individual members of local school boards. These actions require School Board Members to exercise their discretion as local officials to carry out their responsibility of administering and supervising the public schools, a responsibility delegated to them by the State legislature. In the Court's view, the activities alleged by

> Plaintiffs do not resemble those types of extra-legislative activities which courts have been reluctant to include within the sphere of legitimate, legislative activity.

Even though there are clear distinctions between this situation and the student-led, student-initiated prayer before football games condemned by the Supreme Court in *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), the teachings of this decision are, nevertheless, instructive. Based upon *Santa Fe*, use of a student to give the invocation is most probably legally problematical.

In *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003), the Fourth Circuit summarized the *Santa Fe* decision as follows:

> [i]n its most recent school-prayer decision, *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000), the Court struck down a policy that authorized a school's student body to vote on whether an invocation would be delivered at football games. In *Santa Fe*, the Court considered two primary issues. First, it assessed whether the invocation should be considered public, rather than private speech. *Id.* at 302-03, 305-10, 120 S.Ct. 2266. On this issue, the Court concluded that, even though the students made the decision about whether to pray, the school had created the mechanism by which the decision was made, and the prayer was to be delivered "over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer." *Id.* at 310, 120 S.Ct. 2266. For these reasons, the Court decided that the school effectively sponsored the student-led prayer.
>
> The second issue considered in *Santa Fe*, and an issue of substantial significance here, involved whether the pregame prayer was unduly coercive. On this point, the Court noted that certain students, including cheerleaders and football players, were required to attend the football games. *Id.* at 311, 120 S.Ct. 2266. For other students, the "immense social pressure" created by surrounding circumstances compelled their attendance. *Id.* at 311-12, 120 S.Ct. 2266. The Court concluded that "[e]ven if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present in an act of religious worship." *Id.* at 312, 120 S.C. 2266. On this basis, the Court determined that the pregame prayer had an unduly coercive effect, and that the school had accordingly violated the Establishment Clause. *Id.* at 313, 317, 120 S.Ct. 2266.

327 F.3d at 367-68.

As noted, there are obvious differences between student-led prayer at a football game and the situation here, where a student is selected to give the invocation at a board meeting. Students do not generally attend school board meetings and are certainly not required to do so. We have already discussed above our conclusion that a meeting of the school board falls more on the side of a deliberative body than a school setting. Further, it is our understanding that it is the practice in Pickens for the School Board not to involve itself directly in the content of any student-delivered invocation.

Nonetheless, we do not believe that use of students by the Board as is the case here can be fairly characterized as the private speech of the student. While the Board's practice is that the student gives the invocation without direct involvement of the Board, still, just as in *Santa Fe*, the message is delivered on School Board property, under the supervision of the School Board. While the School Board is not mandating the particular prayer, it does require the student to give an invocation, and that alone. This encourages one particular kind of message without dissenting points of view. Thus, under *Santa Fe*, the invocation cannot qualify as purely private speech, but instead speech controlled and regulated by the School Board. See, *Simpson, supra.* This distinguishes the Pickens practice from *Adler v. Duval County School Bd.*, 250 F.3d 1330 (11th Cir. 2001), where the graduation policy allowed the student to choose a graduation message entirely of his or her own choosing, whether religious or not.

Moreover, for the Board to use students to deliver the invocation could be deemed by a court to transform what is otherwise a deliberative body into something more closely akin to the school setting. While courts have concluded that the fact that the students may occasionally be in the audience at school board meetings does not make a constitutional difference, use of students to perform the invocation draws them further into the proceedings of the Board itself. Rather than cast as occasional observers of Board meetings, a court could deem the students now as active participants in the Board meeting itself. *See, Coles, supra* [Court notes that student serves as a Board member, leading, among other things, to conclusion that *Marsh* exemption is inapplicable].

Again, we emphasize that we have located no decision which holds that the use of students to deliver the invocation at school board meetings is unconstitutional under the Establishment Clause. However, we would advise that under the *Sante Fe* decision, such use may be legally problematical and probably should be avoided. This is particularly so in light of the fact that § 6-1-160 does not authorize such a practice as one of the methods for an invocation by a deliberative body. Clearly, the Legislature did not contemplate that school boards would conduct their public invocations this way.

Conclusion

Based upon the foregoing authorities, we would advise the following:

1. While it is a close question, and the issue has not yet been squarely decided in this Circuit, it is our opinion that a court would likely conclude that the *Marsh*

exception for deliberative bodies applies to a school board. As *Simpson* states, the key to *Marsh* applicability is that the audience consists primarily of adults. And, as the Court recognized in *Bacus v. Palo Verde District,* "'a prayer at a school board meeting is of a different species than prayer in a classroom or at a graduation ceremony. A board meeting is fundamentally a meeting of adults, open to the public and conducted for the purpose of doing public business." 11 F.Supp.2d, *supra* at 1197, quoting *Coles v. Cleveland Bd. of Ed.,* 950 F.Supp. 1337, 1345 (N.D. Ohio 1996). Section 6-1-160(A)(2) reinforces this conclusion by defining "deliberative public body" to include a school district. We believe § 6-1-160 is constitutionally valid on its face. Moreover, while other decisions in other circuits disagree, we believe a school district in South Carolina possesses such powers and authority as to qualify it as a "deliberative" or "legislative" body for purposes of *Marsh.* As the Court in *Doe v. Tangipahoa School Board* stated, "[b]ecause the function of the School Board, as the body governing public schools, is more like a legislature than a public school classroom or event, and is patently a deliberative body under the law, the plaintiffs fail to persuade the court that traditional Establishment Clause principles ... apply." 631 F.Supp.2d, *supra* at 839. And, as the Fourth Circuit recognized in *Wynne v. Town of Great Falls,* making no distinction as to any particular public body, "[p]ublic officials' brief invocations of the Almighty before engaging in public business have always, as the *Marsh* Court so carefully explained, been part of our Nation's history." *Wynne,* 376 F.3d at 302. Thus, a court is likely to conclude that Pickens County School Board may constitutionally employ an opening prayer or invocation if it so desires.

2. The question then becomes what type of prayer may be offered by the Pickens Board? Under *Marsh* and the prevailing decisions in the Fourth Circuit, a legislative or deliberative body may open its proceedings *with a nonsectarian prayer only.* While *Marsh* dictates that a court may not "parse" the words or content of a particular prayer, it is well settled law that, in accordance with *Marsh,* (and § 6-1-160) such public invocation or "prayer opportunity" may not be "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh,* 463 U.S. at 795-96.

More specifically, the Fourth Circuit decision in *Joyner v. Forsyth County* follows *Marsh* and represents the governing law in this Circuit. The *Forsyth* majority stated that courts are not "in the business of policing prayers for the occasional sectarian reference – that carries things too far." 653 F.3d at 351. But *Forsyth* made clear that a court will not shut its eyes to, but will step in when a deliberative body shows "patterns of sectarian prayer in public forums ...." *Id.* As the Court summarized in *Forsyth,* "[i]nfrequent references to specific deities, standing alone, do not suffice to make out a constitutional case. But legislative prayers that go further – prayers in a particular venue that repeatedly suggest the government has put its weight behind a particular faith –

transgress the boundaries of the Establishment Clause." *Forsyth* further holds that a court will examine not only an invocation policy on its face, but as implemented. Moreover, *Forsyth* recognizes that the deliberative body's policy must be proactive in discouraging sectarian prayer in the public setting. At bottom, *Forsyth* requires that a deliberative body may not proselytize, nor may it advance a particular faith. Instead the prayer policy must be nonsectarian. In order to meet constitutional standards, the teachings of *Forsyth* should be followed by the Pickens County School Board.

3. Finally, we advise considerable caution with respect to the Board's present practice of choosing students to give an invocation at its meetings. While we have located no decision which squarely holds that such a policy is constitutionally invalid, it is our opinion that the practice here is likely to be deemed by a court under the *Santa Fe* decision to be legally problematical. Based upon *Santa Fe*, a court will likely view this as government-sponsored speech, rather than the private speech of the student. *See, Simpson, supra.* While it is true the Board has no direct role in the content of the invocation, case law strongly intimates that a court would view this methodology as Board sponsored. In addition, use of students to give the invocation, no matter how well intentioned such practice may be, runs the risk of transforming what otherwise may be a deliberative body into a body more akin to the school for purposes of the Establishment Clause. Rather than being cast as occasional observers of School Board meetings, students giving the invocation could be deemed by a court to be active participants in the Board meeting itself. As Judge Wilkinson of the Fourth Circuit has recognized, even a college setting is different from one involving "primary and secondary school students [who] are particularly susceptible to religious indoctrination." *Mellen v. Bunting*, 341 F.3d 312 at 320 (Wilkinson, J. dissenting from denial of rehearing en banc). Moreover, such use is not authorized by the governing statute, § 6-1-160. Our advice is, therefore, to avoid this practice and to adhere strictly to the authorized methods for conducting invocations contained in § 6-1-160. While we cannot point the Board to a specific court decision striking down the practice of using students to deliver the invocation at school board meetings, our advice is that the Board not continue such practice. See *Coles v. Cleveland Bd. of Ed.*, 171 F.3d 369, *supra* at 383 [Court is persuaded in part, in concluding that the school board may not have a prayer, that School Board meetings were more akin to school setting because "at least one student actually sits on the board. to provide a student's perspective."]

Sincerely,

Robert D. Cook
Deputy Attorney General

RDC/an